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Nos. 84-1951 and 84-1981

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

THE SOUTHLAND CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

EUGENE MASTROPIERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to prove petitioner Southland's intent to defraud the United States (No. 84-1951 only).

2. Whether the district court erred in applying separate statutes of limitations to two distinct objectives of a conspiracy charged in a single-count indictment (No. 84-1951 only).

3. Whether the indictment was properly sealed in order to obtain a witness's testimony (No. 84-1981 only).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a)[1] is reported at 760 F.2d 1366.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1985. The petition for a writ of certiorari in No. 84-1951 was filed on June 15, 1985, and the petition in No.

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[1]Citations are to the petition and appendix in No. 84-1951 except where noted.

84-1981 was filed on June 20, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of conspiracy, in violation of 18 U.S.C. 371. The one-count superseding indictment charged that petitioners and a co-defendant, S. Richmond Dole, conspired to violate the Travel Act, 18 U.S.C. 1952, and to defraud the United States by impeding the lawful functions of the Internal Revenue Service (IRS). The jury returned a special verdict finding petitioner Mastropieri guilty of conspiring to achieve both objectives and petitioner The Southland Corporation guilty of conspiring to achieve the tax fraud objective.[2] Mastropieri was sentenced to 18 months in prison, and Southland was fined $10,000. The court of appeals affirmed (Pet. App. 1a-35a).

1. The evidence at trial, which is summarized in the court of appeals' opinion (Pet. App. 3a-11a), established that Southland, a retailer that owns and franchises convenience stores, conspired through a number of its executives to defraud the United States by concealing a bribe to Mastropieri that it improperly deducted as an ordinary business expense on its corporate tax return. In 1973, the State of New York instituted administrative proceedings against Southland to recover substantial unpaid sales taxes. While these proceedings were pending, Southland's Northeast Division manager, Eugene DeFalco, was introduced to Mastropieri, an attorney and member of the New York City Council. Mastropieri suggested that he could resolve the sales tax dispute by bribing members of the State's Tax

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[2]The jury did not reach a verdict on the Travel Act objective of the conspiracy charge against Southland or on the charge against Dole.

Commission. Dole, a Southland vice-president, authorized DeFalco to go ahead with the bribery scheme. *Id.* at 3a-5a.

With Dole's approval, DeFalco agreed to make a payment of $96,500 to Mastropieri, purportedly for legal services rendered by Mastropieri to Southland. This amount included Mastropieri's fee and money for bribes of Tax Commission members. Because the funds would be supplied by Southland's headquarters, the proposal was discussed with Southland's chief executive officer. Dole submitted an invoice from Mastropieri to Southland's controller, Eugene Pender, in July 1977, and a check was issued the same day. Mastroprieri laundered the check, and part of the money was used to establish a bribery slush fund. Pet. App. 5a-7a.

In August 1977, Southland's audit committee commenced an investigation into whether the corporation had made any payments to government officials to settle tax and other disputes. On questionnaires, Dole and DeFalco falsely stated that they were not aware of any such payments. However, Pender identified the Mastropieri payment as questionable, and another executive, Frank Kitchen, admitted in an interview that the payoff had been discussed by Dole and DeFalco. Southland's general counsel, Clark J. Matthews II, told the committee that he had spoken to Mastropieri and that there were no irregularities in the payment. The committee's final report did not mention the Mastropieri matter. Pet. App. 8a-10a.

Matthews and Southland staff attorney Michael Davis remained concerned, however, that the corporation would deduct the payment to Mastropieri on its federal tax return. They raised the question with Southland's outside counsel, but did not explain why the payment might not be deductible. During an IRS investigation in the spring of 1978, Matthews instructed Davis to conceal Pender's and Kitchen's statements to the audit committee. In September

1978, Southland deducted the Mastropieri payment as an ordinary business expense on its 1977 corporate tax return. Pet. App. 6a, 10a.

2. The court of appeals affirmed in a comprehensive opinion by Judge Friendly (Pet. App. 1a-35a). With respect to the sufficiency of the evidence, the court of appeals held that Southland purposefully structured the Mastropieri bribe in a manner that resulted in the improper deduction of the payment and that the corporation obstructed the IRS in its attempt to determine the allowability of the deduction (*id.* at 11a-12a). The court of appeals also held that the jury was properly instructed concerning the applicable statutes of limitations and that the government could rely on separate limitations periods for the different objects of the conspiracy charged in the indictment (*id.* at 13a-16a). Finally, the court of appeals determined that the indictment had properly been sealed for six weeks and that the statutes of limitations were therefore tolled during that period (*id.* at 24a-29a).

ARGUMENT

The decision of the court of appeals is plainly correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Southland argues (Pet. 5-11) that the evidence was insufficient to establish its intent to defraud the United States.[3] The court of appeals correctly rejected this argument as "border[ing] on the frivolous" (Pet. App. 11a).

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[3]Although it found the evidence sufficient in all respects (Pet. App. 11a), the court of appeals upheld Mastropieri's conviction solely on the basis of the Travel Act objective of the conspiracy because certain evidence relating to Mastropieri's involvement in the fraud objective had been erroneously excluded at trial (*id.* at 24a). Accordingly, Southland's arguments, which relate solely to the sufficiency of the evidence and the statute of limitations with respect to the fraud objective, are not germane to Mastropieri's petition.

Southland's argument is that the government failed to prove that at least one of its executives knew that the Mastropieri bribe was not properly deductible under 26 U.S.C. 162(c). Apart from the fact that "it is absurd to suppose that the Southland officials * * * did not know that deductions may be taken only for 'ordinary and necessary' business expenses * * * and that a bribe is not such an expense" (Pet. App. 11a), Southland's argument completely misses the point.[4] Southland was not charged with conspiring to violate 26 U.S.C. 162(c). Rather, it was charged with conspiring to impede the functions of the IRS by preventing the government from discovering the true nature of the claimed deduction. A specific intent to cheat the government out of money is not a necessary element of the offense and was not charged here. See *United States* v. *Klein*, 247 F.2d 908, 916 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958).

Evidence of Southland's willful obstruction of the IRS was ample. The phony invoice, the false statements to the audit committee, the concealment from the IRS investigating team, and the concern Matthews (Southland's general counsel) exhibited over the deductibility of the bribe all served to demonstrate the corporation's knowing participation in a conspiracy to obstruct the IRS. As the court of appeals noted (Pet. App. 11a), "there was evidence that Dole, DeFalco, Matthews and Davis were all very much concerned that the $96,500 payment was being improperly

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[4]Even if knowledge of the nondeductibility of the bribe were an element of the offense and Southland's officials somehow lacked actual knowledge, the corporation would fare no better. The conduct of Matthews, for example, plainly demonstrated at the very least that his suspicions were aroused. This was sufficient to establish knowledge in view of his failure to make further inquiries. See, *e.g.*, *Turner* v. *United States*, 396 U.S. 398, 416-417 & n.29 (1970); *Leary* v. *United States*, 395 U.S. 6, 46 n.93 (1969).

taken as a deduction." Thus, responsible officials of Southland knew that the payment would improperly be deducted on the corporation's tax return, yet rather than taking steps to prevent this from happening, they affirmatively sought to conceal the true nature of the payment. Nothing more is required. See, *e.g., Spies* v. *United States,* 317 U.S. 492, 499 (1943) (willfulness may be inferred from concealment and making false invoices); *United States* v. *Samara,* 643 F.2d 701, 703 (10th Cir.), cert. denied, 454 U.S. 829 (1981) (willfulness may be inferred from failure to supply accountant with accurate and complete information); *United States* v. *Walsh,* 627 F.2d 88, 92 (7th Cir. 1980) (willfulness may be inferred from false statements to IRS agents).

The cases on which Southland relies are completely inapposite. In *Ingram* v. *United States,* 360 U.S. 672 (1959), the Court reversed the conspiracy convictions of two employees of an illegal gambling operation because they lacked personal knowledge of the tax liability of the entrepreneurs of the operation (*id.* at 678-679). They were unaware that they were helping the persons in charge of the operation to evade payment of taxes. Here, by contrast, the evidence established that Southland's executives structured the bribery scheme with the knowledge that it would generate a corporate deduction and they concealed the true nature of the payment from the IRS. Moreover, the defendants in *Ingram* were charged with conspiring to commit substantive tax offenses rather than to defraud the United States (*id.* at 672-673 & n.1, 678). Finally, Southland's conduct was similar to that of the entrepreneurs in *Ingram,* whose convictions were affirmed because they agreed to conceal their sources of income from the IRS (*id.* at 676-677).[5]

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[5]Similarly, in *United States* v. *Tarnopol,* 561 F.2d 466 (3d Cir. 1977), unlike in this case, there was no evidence that the defendants ever filed inaccurate tax returns, made misrepresentations to the IRS, or contemplated the possibility of tax liability (*id.* at 474). Most of the other cases

2. Southland also argues (Pet. 11-15) that because both the Travel Act and fraud objectives of the conspiracy were charged in a single count, the five-year statute of limitations applicable to the former objective must also apply to the latter, even though a six-year limitations period would have applied to the fraud objective had the two been charged in separate counts. See 18 U.S.C. 3282; 26 U.S.C. 6531. The district court instructed the jury that different statutes of limitations were applicable to the two objectives and that it must find an overt act furthering each objective within the relevant limitations period to convict with respect to that objective. The court also instructed the jury to return special verdicts as to each objective; Southland was convicted only for conspiracy to defraud the United States. Pet. App. 3a, 13a.

The district court's instructions would quite obviously have been proper had the two objectives been charged in separate counts. The court of appeals correctly rejected Southland's "somewhat metaphysical argument" that the rule must be otherwise for a single-count charge, finding the contention to lack "a good sense basis" (Pet. App. 13a-14a):

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on which Southland relies stand only for the proposition that the jury must be instructed that ignorance of the law can be a defense where it obviates the specific intent required for an offense. See *Anthony* v. *United States*, 667 F.2d 870, 876-877 (10th Cir. 1981), cert. denied, 457 U.S. 1133 (1982); *United States* v. *Schilleci*, 545 F.2d 519, 523-524 (5th Cir. 1977); *United States* v. *Bryza*, 522 F.2d 414, 423-424 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); *United States* v. *Petersen*, 513 F.2d 1133, 1135 (9th Cir. 1975). Southland complains, however, not of the jury instructions but of the sufficiency of the evidence; these are two different matters. In fact, the district court instructed the jury that it must find that Southland "contemplated loss to the government in the form of income tax which would otherwise have been collected" (Tr. 3087; Southland C.A. App. 688), an instruction unduly favorable to the corporation. See *United States* v. *Klein*, 247 F.2d at 916.

> If the Government adduced sufficient evidence to convince the jury that Southland conspired to defraud it within the six year period * * *, as we have held that it did, we do not see why it should be deprived of a conviction for this violation of 18 U.S.C. § 371 because it failed to establish to the jury's satisfaction that Southland also engaged, during a five year period antedating the indictment, in a conspiracy to violate the Travel Act. * * * If the Government had failed to present sufficient substantive evidence to warrant submission of the Travel Act objective to the jury but did meet its burden with respect to the fraud objective and the jury convicted, [Southland] would surely not have been entitled to have the indictment dismissed. * * * We fail to see how [its] case stands better because the Government did present sufficient evidence to send to the jury the case with respect to * * * both objectives.

Southland contends that the decision conflicts with *United States* v. *Head,* 641 F.2d 174 (4th Cir. 1981), cert. denied, 462 U.S. 1132 (1983).[6] The court of appeals addressed this contention at length (Pet. App. 14a-16a). The court demonstrated that the language in *Head* on which Southland relies was dictum and in any event did not by its terms adopt the rule advanced by Southland; rather, the court in *Head* merely stated that such a rule *may* be appropriate (641 F.2d at 178 n.5). The holding in *Head* was only that a general verdict could not be supported where different statutes of limitations applied to different objectives of a conspiracy and the jury might have convicted on the basis of an objective as to which no overt act occurred

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[6]Southland's reliance on *Braverman* v. *United States,* 317 U.S. 49 (1942), is misplaced. There, the Court permitted separate objects of a conspiracy to be alleged in a single count. That only one statute, 18 U.S.C. 371, is violated misses the point that separate statutes of limitations apply to different sorts of violations of Section 371.

during the relevant limitations period (*id.* at 177-179). Here, the special verdicts returned by the jury obviated that uncertainty. Southland's factbound argument that the jury was confused was considered and correctly rejected by the court of appeals (Pet. App. 14a). Whatever confusion could have arisen would, of course, have been identical had the conspiracy been charged in two counts rather than one.[7]

3. Mastropieri contends (84-1981 Pet. 15-19) that his conviction for conspiring to violate the Travel Act must be reversed because the original indictment was improperly sealed at the time that the statute of limitations ran. His argument is premised on the view that a statute of limitations may be tolled only where an indictment has properly been sealed. Mastropieri asserts that Fed. R. Crim. P. 6(e)(4)[8] permits an indictment to be sealed only when necessary to secure custody of the defendant, which was not the case here, and that even if the Rule does allow sealing for other legitimate objectives, no such purpose was served here. Without passing upon his premise that a timely returned but improperly sealed indictment could violate the statute of limitations, the court of appeals fully considered

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[7]The superseding indictment, returned November 17, 1983, would not have been time-barred even if it had recited the two objectives in different counts (see Pet. 14). Southland is therefore plainly incorrect in arguing that the government engaged in " 'prosecutorial sleight of hand to overcome a time bar' " (Pet. 6, quoting *Dennis* v. *United States*, 384 U.S. 855, 863 (1966)). In fact, as in *Dennis*, "the Government here secured no advantage with respect to limitations" by the manner in which it charged Southland with conspiracy (*id.* at 863-864 n.8).

[8]Fed. R. Crim. P. 6(e)(4) provides:

> Sealed Indictments. The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

and correctly rejected both of Mastropieri's arguments respecting the sealing of his indictment (Pet. App. 24a-29a).

The original indictment was returned on March 25, 1983, two days before the expiration of the applicable five-year limitations period. Thereafter, the government secured an order sealing the indictment in order to assist it in obtaining the testimony of Frank Kitchen in the ongoing investigation of Southland and others; Kitchen had been granted immunity but claimed before the grand jury that he could not remember certain events. The indictment was unsealed six weeks later, shortly after the court of appeals reversed a judgment holding Kitchen in contempt with respect to his grand jury testimony, eliminating any hope of securing useful testimony from him. *In re Kitchen,* 706 F.2d 1266 (2d Cir. 1983).

Rule 6(e)(4) authorizes an indictment to be sealed to obtain custody of the defendant; it does not by its terms prohibit the sealing of an indictment for other purposes. The advisory committee notes state that the Rule was intended to continue the pre-Rules practice, which, as the court of appeals noted, permitted an indictment to be sealed whenever the public interest so required (Pet. App. 27a). In a decision rendered three years after the adoption of the Rules, the Third Circuit, like the court here, concluded that Rule 6(e)(4) does not limit the circumstances under which an indictment may be sealed. *United States* v. *Michael,* 180 F.2d 55, 57 (1949), cert. denied *sub nom. United States* v. *Knight,* 339 U.S. 978 (1950). Mastropieri cites no case to the contrary.[9]

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[9]In *United States* v. *Slochowsky,* 575 F. Supp. 1562, 1567 (E.D.N.Y. 1983), the court cited to *Michael* and held only that it is sufficient if there is "a legitimate prosecutorial need for the sealing." In *United States* v. *Sherwood,* 38 F.R.D. 14, 20 (D. Conn. 1964), aff'd on other grounds *sub nom. United States* v. *Doyle,* 348 F.2d 715 (2d Cir.), cert.

The court of appeals correctly resolved the factbound question of whether the sealing was proper here (Pet. App. 29a). The government was justified in its attempt to secure truthful testimony from Kitchen, although a divided court of appeals ultimately ruled that the witness was erroneously held in contempt.[10] Sealing of the indictment was a proper means of ensuring that Kitchen gave complete and truthful testimony and did not tailor his testimony to fit only what was disclosed by the indictment. The district court correctly found that "the sealing, for a period of six weeks, lasted no longer than was necessary to accommodate legitimate prosecutorial interests" (*id.* at 25a). Moreover, as the court of appeals stressed, the government properly relied on the magistrate's decision to seal the indictment (*id.* at 29a):

> This is a point on which great deference should be accorded to the discretion of the magistrate, at least in the absence of any evidence of substantial prejudice to the defendant. The Government should be able, except in the most extraordinary cases, to rely on that decision rather than risk dismissal of an indictment, the sealing of which it might have been willing to forego, because an appellate court sees things differently, after the expenditure of vast resources at a trial and at a time when reindictment is by hypothesis impossible.

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denied, 382 U.S. 843 (1965), the district court simply placed a reasonableness limitation on the length of time that an indictment could be sealed. Even if these decisions did conflict with the present case, they would, of course, no longer be good law since they arose within the Second Circuit.

[10]The majority stated that the government's theory that Kitchen's claimed failure of memory was untruthful was a "plausible" one (*In re Kitchen*, 706 F.2d at 1276). In dissent, Judge Lumbard concluded that it was "incredible" that Kitchen could have forgetten what had transpired (*id.* at 1277).

Finally, the court of appeals observed that Mastropieri "has not even asserted prejudice from the sealing of the indictment for 39 days" (*ibid.*).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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